IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 19, 2007

STATE OF TENNESSEE v. ERIC L. ABELL

Direct Appeal from the Circuit Court for Rutherford County
Nos. F-45294, F-54661 James K. Clayton, III, Judge

No. M2006-01981-CCA-R3-CD - Filed July 23, 2007

In three separate cases, the Defendant, Eric L. Abell, pled guilty to multiple drug offenses and was sentenced to eighteen years and one month of probation. A probation violation warrant, and two amended warrants, were filed against the Defendant. After a hearing, the trial court revoked the Defendant's probation and ordered him to serve his entire sentence in prison. On appeal, the Defendant contends that the trial court abused its discretion when it revoked his probation. Concluding that no error exists, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Gerald L. Melton, District Public Defender and Russell N. Perkins, Assistant District Public Defender, Murfreesboro, Tennessee, for the Appellant, Eric L. Abell.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; William Whitesell, District Attorney General; Trevor H. Lynch, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In case number F-45294, the Defendant pled guilty on January 27, 1999, to one count of selling more than .5 grams of cocaine and to three counts of selling less than .5 grams of cocaine. He was sentenced to an effective sentence of eight years and was ordered to serve his sentence in boot camp. The Defendant agreed as part of this plea agreement that he had violated his probation from a previous 1996 conviction, case number F-36897.[1]

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[1]The sentence in case number F-36897 has since expired and the violation of probation warrant with respect to this case was dismissed.

In case number F-54661, the Defendant pled guilty on August 5, 2005, to possession of less than .5 grams of cocaine and was sentenced to ten years of probation. This sentence was ordered to run consecutively to his sentences in cases F-45294 and F-36897. As part of this plea agreement, the Defendant agreed to "waive application for a suspended sentence" if he violated his probation.[2]

At the Defendant's probation violation hearing in case numbers F-45294 and F-54661, the following evidence was presented: Lucy Kilburn, the Defendant's probation officer, testified that she began supervising the Defendant in August of 2005. At their first meeting, Kilburn and the Defendant went over the terms of the Defendant's probation, and he signed and received a copy of the order setting forth those terms in case number F-54461. The order also clearly articulated that the Defendant's probationary sentence in that case was to be served consecutively to his probationary sentence in case numbers F-36897 and F-45294. In accordance with the conditions of probation, the Defendant agreed to maintain good and lawful behavior, obtain and maintain lawful employment, not associate with anyone using illegally obtained controlled substances, pay court costs and fines, not associate with convicted felons, and submit a DNA sample. He further agreed to waive application for a suspended sentence if he were to violate his probation.

Kilburn testified that, as part of the Defendant's probation, he was also required to submit to random searches. In April of 2006, the Defendant did not have a driver's license because it had previously been revoked. As part of his supervision, Kilburn asked him to be escorted to his car and have it searched by other probation officers. The Defendant told her that he did not drive to the probation office. Probation officers followed the Defendant to ensure that he was being truthful, and he went to his car that was parked a short distance away. The officers asked to search the Defendant's vehicle, he consented, and then he drove away.

In March of 2006, Kilburn filed a probation violation report alleging the following: (1) the Defendant had been arrested and charged with driving on a revoked license; (2) the Defendant had been discharged from his last job and failed to gain employment; and (3) the Defendant failed to pay required fees and costs. She filed an amended probation violation report in May of 2006, further alleging that the Defendant had (1) not verified any employment since April 11, 2006, (2) failed to report to his probation officer, and (3) failed to comply with the DNA requirement. The trial court issued a probation violation warrant based upon these reports. A second amended probation violation report, which is not included in the record but about which Kilburn testified, was filed in June of 2006, alleging that the Defendant had violated his probation by being arrested on June 6, 2006, and charged with simple possession of drugs, driving on a revoked license, possessing drug paraphernalia, and failing to report this arrest. Kilburn testified about each of these incidents in detail.

[2]Between 1996 and 2005, the Defendant received numerous other convictions and violated his probation multiple other times. Those facts however are not relevant to this appeal in that they neither comprise the basis for his probation in this case nor the basis for his violation of probation.

On cross-examination, Kilburn acknowledged that, between February and April of 2006, the Defendant attempted to find employment, he obtained employment in April, and he eventually provided Kilburn with this information. She explained that, according to the terms of his probation, the Defendant was required to report any unemployment immediately, and he failed to comply with that requirement. She also said that the Defendant reported twice in April but failed to report in May, missing four report days that month.

Massey M. Hemenway, a probation and parole officer, testified that he was assisting in searches of probationers and parolees in April of 2006. As such, he was involved in searching the Defendant's car. He said that he was notified by his supervisor that the Defendant had told his probation officer that he had not driven, but then the Defendant walked to his car parked at a nearby location. The supervisor followed him and requested consent to search the car, and then notified Hemenway who joined the search. Hemenway said that they did not find any type of contraband, so they let him go, and he drove away.

Hemenway testified that, on June 6, 2006, he was with Officer Harry Haigh of the Murfreesboro Police Department conducting normal field operations. Officer Haigh pulled over the Defendant and requested consent to search the Defendant's vehicle. The Defendant's passenger exited the vehicle while the search was being conducted. Another officer, Officer Lovejoy, arrived with a drug-sniffing dog, which "hit on" the steering wheel. The officers removed the steering wheel cover and found marijuana. Hemenway contacted Kilburn and informed her of the situation. He then determined that the passenger in the car was Michael Clark, who was also on probation.

Officer Harry Haigh testified that he pulled over the Defendant and the Defendant's cousin, Michael Clark, Jr., a convicted felon, after observing the Defendant drive without a seatbelt. Officer Haigh performed a license check and discovered that the Defendant's license had been revoked. The Defendant consented to a search, and Officer Haigh searched the vehicle during which he found a digital scale. The Defendant told him that he used the scale to weigh sugar. A K-9 officer arrived and, after searching the vehicle, the dog immediately "hit on" the steering wheel. The officers pulled back the cover of the steering wheel and discovered a partially smoked marijuana cigarette. On cross-examination, Officer Haigh testified that the case involving the Defendant's arrest for the incident described above had been bound over to the grand jury. Officer Haigh said that he gave the substance found in the Defendant's steering wheel to the Tennessee Bureau of Investigation laboratory for testing, and he had not received the results from that test.

The Defendant testified that he had been arrested on January 30, 2006, for driving on a suspended license and that the charge was still pending. The Defendant testified he had been fired from his last job on February 3, 2006, and he did not call Kilburn to tell her he had been fired but told her at his next reporting date. He stated he found another job on March 8, 2006, which he told her about at his next reporting date. He explained that Kilburn told him that he had thirty days to find new employment in order to comply with the terms of his probation.

The Defendant agreed that he had failed to pay probation fees from September 2005 onward

but explained that he did so because he was trying to save money to obtain a driver's license and to pay child support. The Defendant testified that he made an appointment with the health department to give a DNA sample, but he missed the appointment because he was working overtime. The Defendant testified that he called Kilburn from work to notify her that he would miss his meetings in May, and he planned to report in June.

The Defendant testified that all of the other charges against him were still pending. He said that he had not yet pled guilty because he did not know how that plea would affect this current probation violation hearing.

About the incident in April of 2006, when he was seen by the probation officers driving while his license was suspended, the Defendant testified that he was at Chuck E. Cheese at the mall with his girlfriend. He testified that he needed to go to his meeting with his probation officer. He knew that if he drove to the probation office they might see him driving, so he parked nearby. The Defendant recalled that nothing illegal was found in his car, and no one asked him not to drive away.

On cross-examination, the Defendant testified that he had violated the terms of his probation by driving and by being with a convicted felon. He admitted that he lied about the scales in his car, and he said that he had been trying to sell them for quite awhile but could not find batteries for them. The Defendant also acknowledged that his work records did not indicate that he worked overtime hours.

The trial court found that the Defendant had violated his probation by driving on a revoked license and associating with a convicted felon. The trial court noted that the Defendant had previously agreed to serve his sentence if he violated his probation, and he had violated his probation in this case. Therefore, the court ordered the Defendant to serve his original sentence of eighteen years and one month in the Tennessee Department of Corrections.

II. Analysis

On appeal, the Defendant contends that the trial court abused its discretion by revoking his probation. The Defendant asserts that he has not yet been convicted of the charges leading to his last arrest and that Michael Clark's status as a convicted felon was not proven at the revocation hearing. The Defendant maintains that "mere accusation" is insufficient to support the revocation of his probation.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); *see* T.C.A. §§ 40-35-308, 310, 311 (2006). The defendant has the right to appeal the revocation of his probation and entry

of his original sentence. T.C.A. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . . ." *Id.*; *accord Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . . ." T.C.A. § 40-35-310.

The decision to revoke probation is in the sound discretion of the trial judge. *State v. Kendrick*, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court's finding to revoke probation, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. *Mitchell*, 810 S.W.2d at 735. In our view, after exercising a conscientious judgment as to whether or not a Defendant has violated the terms of a probated sentence, the trial court must also exercise a conscientious rather than arbitrary judgment as to an appropriate disposition. *State v. Steven Kelly Fraze*, No. M2005-01213-CCA-R3-CD, 2006 WL 618300, at *9 (Tenn. Crim. App., at Nashville, Mar. 13, 2006), *perm. app. denied* (Tenn. 2006).

In this case, the Defendant admitted a violation of the terms of probation. This alone is substantial evidence of record to support the trial court's revocation order. *See State v. Eric D. Devaney*, No. E2005-01986-CCA-R3-CD, 2006 WL 2373469, at *4 (Tenn. Crim. App., at Knoxville, Aug. 17, 2006) (holding that where the defendant admits a violation of the terms of probation, revocation by the trial court is neither arbitrary nor capricious); *State v. Michael Emler*, No. 01C01-9512-CC-00424, 1996 WL 691018, at *2 (Tenn. Crim. App., at Nashville, Nov. 27, 1996) (same).

Further, pending charges can be the basis for a revocation of probation. *See State v. Adams,* 650 S.W.2d 382, 383 (Tenn. Crim. App. 1983) (allowing revocation based, in part, on pending forgery charge). However, there must be more than a "mere accusation" if the ground for revocation is the commission of a new offense; indeed, the State is required to establish sufficient facts at the revocation hearing to enable the court to make a proper judgment whether the conduct in question violated the law. *Harkins*, 811 S.W.2d at 83, n.3. This is true, in part, because an indictment is based on probable cause, *State v. Brackett*, 869 S.W.2d 936, 938 (Tenn. Crim. App. 1993), whereas the standard for revocation of probation is preponderance of the evidence. *Harkins*, 811 S.W.2d at 82. Thus, the State must produce evidence in the usual form of testimony in order to establish the probationer's commission of another offense. *State v. Clyde T. Smith*, M2002-00553-CCA-R3-CD,

2003 WL 140040, at *3 (Tenn. Crim. App., at Nashville, Jan. 21, 2003). We have concluded previously that a police officer's testimony about the facts surrounding the arrest used as the basis for the probation violation "constituted substantial evidence" and was "sufficient to support the trial court's [revocation of probation]." *State v. Chris Allen Dodson*, M2005-01776-CCA-R3-CD, 2006 WL 1097497, at *3 (Tenn. Crim. App., at Nashville, Mar. 31, 2006).

In the case under submission, a probation officer testified that he witnessed the Defendant being pulled over while driving with another probationer. The Defendant consented to a search, and a K-9 officer alerted the other officers to a substance in the steering wheel. The officers removed the steering wheel cover and found a partially smoked marijuana cigarette. Officer Haigh testified that he initiated the traffic stop that led to this search. He said that the Defendant was with a convicted felon when he was stopped, there was a digital scale in the car, and that marijuana was found in the steering wheel. This evidence provides a sufficient basis to support the trial court's revocation of probation.

We also conclude that the trial court acted within its discretion when it ordered the Defendant to serve the balance of his sentence in prison. The record indicates that the Defendant is a poor candidate for probation. The trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." T.C.A. § 40-35-311(e). The Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authority, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE